APPENDIX A

STATE OF MICHIGAN COURT OF APPEALS
DIVISION 2

No. 15078

DAHLBERG, SIMON, JAYNE, WOOLFENDEN & GAWNE, a Michigan Co-Partnership, *Plaintiff-Appellee,*

v.

VULCAN FORGING CO., a Michigan Corporation, *Defendant-Appellant.*

BEFORE: R. B. Burns, P. J., Brennan and Van Valkenburg, JJ.

PER CURIAM:

Plaintiff brought this litigation for the purpose of collecting the unpaid balance on an oral contract relating to the sale of the entire assets of defendant corporation. Defendant asserted that plaintiff lacked the legal capacity to bring the action, that the contract was captured by the statute of frauds and that further defendant had counterclaims in excess of the amount claimed by plaintiff. After a non-jury trial, the court entered judgment in favor of plaintiff in the amount prayed for and dismissed defendant's counterclaim. Defendant appeals.

Defendant first asserts that the trial court erred in determining that plaintiff had complied with the filing provisions of MCLA 449.101 *et seq;* MSA 20.111 *et seq,* and therefore had the capacity to maintain this lawsuit. The record indicates that plaintiff filed the required partnership certificate in 1960 listing its principle place of business as the Penobscot Building. By the time of the execution of the contract considered herein, plaintiff had moved its principle office to the nearby Ford Building and had opened a branch office in Birmingham. No certificate as to the

change of address was filed until three days after the trial began.

Defendant asserts that pursuant to MCLA 449.106; MSA 29.118 plaintiff should be barred from bringing this action by reason of its failure to file a change of business location certificate as required by MCLA 449.104(a); MSA 20.115. MCLA 449.104(a), *supra*, required the filing of such a certificate of location change when the "copartnership operating under an assumed name has changed or changes its place of business". It has been held that a copartnership operating under the surnames of the persons involved in the enterprise is not operating under an assumed name. See *Winget* v *Grand Trunk R Co*, 210 Mich 100 (1920); *Zeman* v *Trim*, 181 Mich 130 (1914). Further, since plaintiff cured the defect, if any, prior to the actual dismissal of the suit, we believe that that rationale applied to corporations in *Michigan Rural Development* v *El Mac Hill Resort, Inc*, 34 Mich App 505, 509 (1971) should be applied to copartnerships. The Court in *El Mac, supra*, held that:

> "A corporation is entitled to proceed with a pending lawsuit if it cures the default any time prior to actual dismissal of the suit."

Since the operative language of MCLA 449.106, *supra*, is identical in all material respects to that of MCLA 450.87; MSA 21.87, the statute construed in *El Mac, supra*, it follows that the holding in *El Mac* is applicable here. Accordingly, default, if any, on the part of plaintiff was cured by the subsequent filing of the certificate before the dismissal of the cause of action.

Defendant also asserts that plaintiff was estopped from bringing an action on this contract because it was operating in the capacity of real estate broker without obtaining the necessary license. See MCLA 451.201; MSA 19.791. This issue is totally without merit. MCLA 451.202; MSA

19.792 clearly provides that the real estate broker licensing provisions shall not "be construed to include in any way the services rendered by an attorney at law in the performance of his duties as such attorney at law". The trial court found, and the record supports, that plaintiff in no way solicited or procured a buyer but rather merely negotiated on behalf of defendant with the prospective buyer which had already been found. While the bounds of what constitutes the practice of law are difficult to define, we find that the record herein clearly supports that services rendered were that of an attorney rather than real estate broker. See *Krause* v *Boraks,* 341 Mich 149 (1954); *Detroit Bar Association* v *Union Guardian Trust Co,* 282 Mich 216 (1937). By the same token, since this was a contract for legal services and not for the sale of land, it was not captured by the statute of frauds.

As to defendant's contention that the trial court erred in allowing as costs $1200 as expert witness fees for three witnesses who testified as to the propriety of the amount of plaintiff's claim, it should be noted that while plaintiff eventually rested its claim on the express oral contract, at the time the witnesses testified plaintiff was still proceeding on the theory of *quantum meruit.* The witnesses were fully cross-examined by defendant's attorney and no objections were made to their testimony at that time. Generally speaking the allowance of expert witness fees rests in the sound discretion of the trial court. *Maas Brothers, Inc* v. *Weitzman,* 288 Mich 625 (1939). Under these circumstances, and particularly in light of the fact that the trial court found the testimony beneficial in determining that plaintiff did not act in an overreaching fashion in setting the fee, we cannot say that the trial court abused its discretion in allowing the expert witness fees as costs.

Defendant's remaining assignments of error have been reviewed and been found to be lacking in merit.

Affirmed. Costs to the plaintiff.

APPENDIX B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

No. 70-70882

DAHLBERG, SIMON, JAYNE, WOOLFENDEN & GAWNE,
Plaintiffs,

v.

VULCAN FORGING COMPANY, *Defendant.*

[Opinion Rendered From the Bench, July 6, 1972]

THE COURT: The Court is of this opinion, both counsel having rested: First, this is a suit by a plaintiff co-partnership. The Court is satisfied from the proofs that the partnership is the real party in interest. That jurisdictional requirements are satisfied.

The Court is further satisfied that through the good offices of tax counsel who represented Mr. Adolph Meyer, the principal of the defendant, who was obviously clothed with not only apparent authority but real authority, as determined by the conduct of the parties, Vulcan at no time ever disavowed the fruits of the services of a contract with the Ford Motor Company, which was almost joyfully entered into because the price eventually agreed upon was so far in excess of the book value or market value, take whichever you will, of the items which went with the business, i.e., the real estate and the personal property.

So the Court is satisfied that the plaintiff is the real party in interest, that the Court has jurisdiction, and that the defendant was the one who entered into the contract with Roy Dahlberg, who was there on behalf of his law firm.

Now, this is an unusual type of contract. It is a contract which should be more carefully scrutinized than any

contract known to the law. The reason for it is that it is a contract for legal services rendered. The Court makes that as a finding of law and fact.

The pleadings are specific, and the proofs in support of the pleadings establish that it was to assist in the negotiations and sale. For example, the record shows that in the course of performance Mr. Meyer did a little negotiating on his own. He obviously was well served by doing it. This is a ploy which is not only customary and usual for clients to do, but very often the client is a better businessman and knows the value of the product of the sale better than the lawyer. The lawyer's function is one which is best defined by the word "attorney". He is an agent who does his master's work. He must do it faithfully and with a high degree of fiduciary care.

Now, in determining the legal fee the first criterion or subject to be examined is the time and labor required. In this case, as the Court recollects, the defendant conceded there was in excess of 700 hours. The proofs indicated in excess of 800 hours.

The Court is satisfied that the hypothetical question which was phrased to the three expert witnesses truly represented the facts as elicited in the testimony and the exhibits in this case. We heard testimony from a past president of the American Bar Association who testified that in his opinion, as I recollect, the service was worth, drawing the only logical inference from his testimony, $125,000. That was the testimony of Mr. Gossett.

Mr. Clarence Patterson, a lawyer of this Bar of many years' experience in the general practice of law, testified that a fair fee for the services rendered was $125,000. There was further testimony by a lawyer of Oakland County, a State Bar Commissioner, Joseph L. Hardig, Jr., to the effect that the services rendered were of the value of $125,000.

Now, in the ordinary contract case it is immaterial what the value of the services are. It is a contract price which is the guideline. But I submit that one of the first things a Court should be concerned about is that the lawyer in question is not overreaching, and that the express contract which ultimately results truly reflects the ethical support, is within the canons of professional ethics, and is not one which is exorbitant.

The contract in this case which was agreed upon, Mr. Dahlberg indicated initially when solicited by a tax lawyer from New York, who was employed by Mr. Meyer, that $100,000 would seem to be a fair fee in light of the contemplated efforts on his behalf. That was agreed to. There is just no question. There is no proof to the contrary. So the first criterion, in the Court's opinion, of an assumpsit action for legal services, is that it also conforms to the canons of professional ethics.

As to the time and labor required and the fairness of the fee, we have certainly a sufficient number of hours. This was represented in a hypothetical question. We have the testimony of the three witnesses, whose testimony was uncontroverted.

Now, there is another question involved. That is, under the canons of professional ethics, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause. In this case we had literally a written contract between Mr. Raymond Fox, an attorney for the defendant, and the defendant. He served as general counsel for a number of years. He has done a lot of legal work for them. Obviously he had done it to the satisfaction of Mr. Meyer.

He testified that from time to time they had arguments. In fact, once, I think, his employment had been terminated. But nevertheless, at the time in question the relationship was a good one. Mr. Meyer evidently thought Mr. Fox

was competent to do the work necessary, except, I might add, as to the tax work. He went to New York City for his tax expert.

After consulting with his tax expert Mr. Meyer, who was clothed with all the authority in the world to represent the defendant decided that he didn't want the tax lawyer and he didn't want his general counsel to negotiate with the Ford Motor Company. He was, in non-legal language, getting into the big leagues. He felt he ought to go and get a lawyer who was commensurate with the task. So he went to and negotiated with and hired Mr. Roy Dahlberg, who obviously was recommended to him by all concerned.

Now, suffice it to say that that constitutes the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause, the Court being of the opinion that Mr. Dahlberg was sought out because of his peculiar abilities, on the one hand, and secondly, the sale of a $2,000,000 business I submit is a question legally fraught with almost innumerable legal novelties. It is a case which requires the highest degree of skill in the legal profession.

Another consideration in determining whether the fee is in propriety is whether the acceptance of employment in a particular case will preclude the lawyer from doing other business. It stands to reason if a lawyer is to work as an hourly-rated employee works, a 40-hour-week, which seems to be the fashion nowadays, if you did a little simple division you would find that 700 or 800 hours is an awful lot of time. It meant he had to abandon the balance of his clients. And I might point out for purposes of the record that in addition to abandoning his other clients he was doing business with a client that he obviously could contemplate was a one-shot deal; i.e., the general counsel by his own testimony was Mr. Fox. So that, too, was a requirement in setting a fee. In the opinion of the Court the record discloses that was said by Mr. Dahlberg.

Then we come to the question of what are customary charges of the Bar. Regardless of time or novelty or responsibility, what are the customary charges? It would appear that Mr. Dahlberg erred only on the side of cheapness. His brothers of the Bar, certainly as fine a threesome as a Court could have testify in support of legal services, indicated that he sold a product which was worth $125,000 for $100,000. So we cannot criticize him other than for the cheapness of his approach to the problem.

The amount involved in a controversy is always of great importance. As I have said before, $2,000,000 is a lot of money in the life of Mr. Meyer. He was incorporated but he owned the stock or had family trusts. We must assume from the testimony that he had spent his life in the business. He knew the business. This was very important to him, obviously. He did not treat it as he did normal routine business, because he did not use his tax lawyer or his general counsel. He got specialists. So in light of that, that particular canon is satisfied.

We come next to the contingency or certainty of the compensation. I submit that in this case the only bad judgment I can find that Mr. Dahlberg used is that he didn't understand that with which he was dealing. That is that his fee might be an uncertain one in the collecting. He took it on faith. He didn't really go as far as he could in protecting his own interests.

In this case obviously there wasn't any question but what the client was going out of business. He intended to sell. He had reached that age where he felt that he should sell. And he had a purchaser available to him that obviously was ready, willing and able to buy. So as a practical matter, if it had been a contingency there would have been every reason for Mr. Dahlberg to have insisted upon more money, which he did not do.

I have covered the question of whether or not it was an established or constant client. I would say it was not. It was a one-shot deal.

None of these considerations are controlling. They all should be taken into consideration. In some instances one or more of them may be on the weak side and the fee may still be substantiated. However, I submit in going over these considerations which have been furnished to us by court rule as well as by resolution of the State Bar of Michigan, the Court can find no single one of these ethical requirements that was not more than satisfied on the part of Mr. Dahlberg.

Now as to the defects in his performance. It is basic in the law of contracts that at any time there is a substantial breach in the promise made by either party the other party may terminate the contract. So let's take a look at all of the allegations which are made concerning the conduct of Mr. Dahlberg.

First, that he didn't furnish the appraisal. Well, let's assume for purposes of argument that was one of his duties. As I see it, that was not necessarily one of his duties. I would make that as a finding of fact. That appraisal was something that Ford wanted. He could care less about that appraisal. It had nothing to do with the determination of the price. The determination of price and the last increase was tied to the good will of the business; i.e., the fact that connecting rods were manufactured and were the sole product, as I gather from the record. That Ford Motor Company needed them. They were the only customer. They had to have his business. They just couldn't let it go out of business and let it be sold. So Mr. Meyer took advantage of that and got a high price.

Now, he had at least three opportunities to get into this question of whether or not the perishables were perishables or were not perishables. There is just no question in my mind, and I make it as a finding of fact, that Mr. Dahlberg invited him to the meeting at the DAC. For reasons best known to himself he didn't go.

I might add at this point that as to two witnesses in this case, Mr. Fox and Mr. Meyer—and this is important, I think, to the decision of this case—they are bordering on senility. Both of them have convenient memories. Now, you could reach the conclusion that they didn't remember some meetings that took place until they got on cross-examination, or the fact that their testimony taken at the deposition was different than it was at the time of trial.

In a man of younger years we would be led to the conclusion and make a finding they were dishonest, were not telling the truth. In this case I don't think it is necessary that you determine which is the case. The question is, what are the facts. This Court is convinced that either by reason of senility or the fact they were not telling the truth, they could not remember the meetings convenient to them, but did remember the meetings they did not want to attend. As a practical matter, Mr. Fox initially could not remember one meeting, but later had his recollection refreshed. He had at least two opportunities where he signed certificates certifying that everything was in order.

Now, I submit, what kind of general counsel is it who is going to represent the corporation to the hilt and do his ethical duty as a lawyer and go to two or three meetings and there sign certificates as an officer and secretary, what have you, certifying that all of the conditions precedent are satisfied so you sell $2,000,000 in assets to the Ford Motor Company, and then claim they are defects? It has either got to be, on the one hand, something detrimental to the interests of the defendant, or, two, it was fraud on the Ford Motor Company, one of the two.

Well, no one has suggested Ford was defrauded. They got $2,000,000 worth for their $2,000,000. Mr. Meyer and the corporations got $2,000,000 in cash. They have not disavowed the deal. They are merely trying to go back through and nitpik the deal to see which items were not performed so they won't have to pay the legal fee.

First, the appraisal was not material to begin with. The minutes of the board of directors were not only not material, the fact of the matter is they were probably the duty and within the contractual relationship of Mr. Fox and not Mr. Dahlberg. Mr. Dahlberg did not agree he was going to draw all the corporate minutes and make allocations and draw certificates. He said he was going to negotiate to sell a going business and assist in the sale thereof at the highest possible terms, period. Those were his legal services. Anything he did by way of allocations, furnishing of appraisals as a messenger boy, drawing minutes, certificates, contracts of sale I submit were done much as a real estate broker is permitted to do, as an incidence to his primary duty, which was to negotiate and sell a business. So it was not within the express language or inferential language of his contract to do those things.

Secondly, if you could construe it was his duty as lawyer's work to tidy up things as he went along, if at any time any one of these were a substantial breach at that point Mr. Meyer should have fired him. He could have fired him if they were substantial.

I submit, first, he used good judgment. Mr. Dahlberg was doing everything he could have done. Mr. Meyer got everything he wanted out of the Ford Motor Company. Mr. Meyer did not in any way attempt to fire him. He kept him on the job.

I submit there is no case law to the contrary. That when the results obtained are all that the client wanted, when there has not been a substantial breach in the first place, or in the second place if there has been a substantial breach it has been waived by permitting the man to go ahead and continue his work, that there can be no cause of action on a cross-complaint for, one, immaterial defects, two, defects which are outside the terms of the contract, or three, which are not substantial, but which if any court construes they were substantial were waived by permitting Mr. Dahlberg to go ahead and close the deal.

Now, I might point this out: It was apparent to this Court from the candor and demeanor of Mr. Fox on the witness stand that he is a victim of what is known in this profession and many others as sour grapes. Mr. Fox undoubtedly considered himself to be a loyal and true employee, general counsel of the defendant corporation, and in particular of Mr. Adolph Meyer. All of a sudden like a bolt from the blue this man from New York digs up Mr. Roy Dahlberg to negotiate and sell, which obviously would be the biggest legal fee that Adolph Meyer would ever contemplate paying. Witness the fact Mr. Fox testified that for going over the whole deal and examining it—he never did point out what the defects were, but he had to go over and scrutinize the whole deal—he charged $3500.

Now, I submit that it is evident from his testimony, first, that he had a convenient memory, which is due either to senility or the fact that he is not being honest with the Court. You can take your pick as to that. However, his testimony in deposition and his testimony on the stand on direct and cross-examination was inconsistent.

Secondly, there just weren't any defects.

Thirdly, his motives obviously were that he didn't get this $100,000 fee. He had been bypassed. He was obviously upset because Mr. Meyer didn't consult him.

But notice he did not terminate his employment. He didn't face it forthrightly and say to Mr. Dahlberg: You are in here unethically. You are poaching on my preserve. Mr. Meyer, take one or the other of us. No. Each time when called he rushed in. He had ample opportunity.

I submit when a lawyer signs his name to a document as general counsel and secretary and director and certifies the meetings have been held, I submit his word should be his bond. What more could Mr. Dahlberg and the Ford Motor Company expect than that he would do the honest thing? Instead he comes in and testifies, well, he signed

them but he was being rushed. Rushed by who? He was being rushed by Adolph Meyer.

Why was he being rushed by Meyer? He was being rushed by Meyer because Meyer thought for tax reasons he had to close the deal by the end of the year. He obviously wanted to get his fists on the $2,000,000.

For all of these reasons the Court is convinced that the defense in this case—this is not directed at trial counsel but at Mr. Meyer and Mr. Fox—the Court is of the opinion that the defense they posed by way of testimony is frivolous. That in point of fact and law a judgment should enter in this case for the full amount of the balance due on the contract, which is $65,000, and in addition the sum of $21,151.70.

The Court is of the opinion that costs should be taxed in the usual fashion.

The Court will sign an order to that effect.

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APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

No. 70-70882

DAHLBERG, SIMON, JAYNE, WOOLFENDEN & GAWNE, a copartnership, *Plaintiff*,

v.

VULCAN FORGING COMPANY, *Defendant*.

Judgment

At a session of said Court held in the Court House in the City of Pontiac, in said County, on the 9th day of August, 1972.

PRESENT: HONORABLE JAMES S. THORBURN
Circuit Judge

This cause having come on to be heard, proofs having been taken, counsel for the respective parties having presented argument, and the Court being fully advised in the premises,

IT IS ORDERED AND ADJUDGED, That Defendant's Cross Complaint be and the same hereby is dismissed.

IT IS FURTHER ORDERED AND ADJUDGED, That Plaintiff recover of Defendant the sum of SIXTY-FIVE THOUSAND DOLLARS ($65,000.00) and in addition thereto interest thereon in the amount of TWENTY-ONE THOUSAND THREE HUNDRED NINETY-FIVE AND 83/100 DOLLARS ($21,395.83).

JAMES S. THORBURN
Circuit Judge

Findings of Fact

The Court makes the following findings of fact:

(1) The Plaintiff partnership is the real party in interest.

(2) This Court has jurisdiction of the parties and the subject matter.

(3) There is a valid contract for legal services entered into by the Plaintiff and the Defendant, which contract the Court finds is in all respects proper under the canons of professional ethics. The contract required the Plaintiff to assist in negotiations for the sale of the Defendant's business.

(4) The Plaintiff fully performed its part of the contract.

(5) The Defendant's allegations with respect to nondisclosure and concealment of material facts by the Plaintiff are without support by the evidence.

(6) The Plaintiff had no obligation to obtain and furnish Defendant with an appraisal.

(7) [Deleted.]

(8) Defendant knew and agreed in writing that the special and perishable tools were included in the purchase price and were not to be paid for as inventory in addition to the purchase price.

(9) The Defendant's affirmative defenses and cross-complaint are totally without credible evidentiary support and are without merit.

For the foregoing reasons:

(1) Defendant's Cross-Complaint is dismissed.

(2) Plaintiff shall have judgment against Defendant for SIXTY-FIVE THOUSAND DOLLARS ($65,000.00) plus interest at FIVE PERCENT (5%) per annum from January 2, 1966 to date of entry of Judgment.

JAMES S. THORBURN
Circuit Judge